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October 9, 2007

In the Matter of

Stephen and Claire Stafford
David Hoyle
John Murray

Docket Nos. 2007-093,094,095
File No: SE 351-872, 873, 874
Wrentham

RECOMMENDED FINAL DECISION

This matter involves an appeal of a Superseding Order of Conditions affirming the Conservations Commission's approval of the applicant's plan to conduct Title V system upgrade activities in the Buffer Zone of a lake that will re-route the flow of wastewater from existing cesspools into a Title V compliant tight tank. The location of the tight tank will require the new force main to travel up a relatively steep twenty-foot vertical slope that will require excavation and stabilization. The petitioner has appealed the SOC raising issues related to the potential impacts from the construction process on the resource area. On September 5, 2007, the Department filed a motion to dismiss for failure to state a claim. At the pre-screening conference on September 6, 2007, the parties discussed alternative construction mitigation measures, but



were unable to reach agreement. On September 24, 2007, the petitioner filed his response to the Department's motion.

In his request for the SOC, the petitioner alleged that the project was not limited to the Buffer Zone, but the Claim for adjudicatory hearing, statements made at the pre-screening conference and the petitioner's response to the motion concede that the work subject to wetland's jurisdiction is only occurring in the Buffer Zone. The standard for work in the Buffer Zone is whether the work will alter the adjacent wetland, and if so, whether that alteration will adversely affect the wetland's ability to sustain the statutory interest. See, e.g., In the Matter of Farber & Waage, Docket No. 2001-106, (Final Decision August 23, 2002).

The petitioner's Claim asserts "facts" which, in part, relate to procedural issues before the Conservation Commission (Fact A and B), information on one of the applicant's current use of a tight tank (Fact G), lack of incorporation of Occupation Safety and Health Agency (OSHA) standards (Fact H) and property interest disputes(Fact I) that are either irrelevant to or beyond the jurisdiction of this appeal. Thus, those claims warrant dismissal. The remainder of the claims, as supplemented by the petitioner's presentation at the pre-screening conference and a letter from his geotechnical engineer, assert by means of general allegations or reference to specific construction techniques that the SOC lacks sufficiently detailed conditions regarding excavation and construction techniques and erosion controls to prevent adverse impacts in the event the slope should fail or significantly erode soil into the resource area.

The petitioner's claims do not assert that the activities proposed will violate the standards for work in the Buffer Zone. Instead, the claims are based on speculation as to what might occur in the event of slope failure or construction mishap. Those claims are not facts, but projections of future events that might occur and suppositions of their potential impacts. A claim is properly

dismissed when the harm predicted is too speculative, remote or hypothetical. See Matter of Boston Air Charter, Docket No. 2004-183 (Final Decision, May 31, 2005); Matter of Town of Falmouth Department of Public Works, Docket No. 93-032, Decision of Order and Motion to Dismiss (September 2, 1994). The speculative nature of the Claim is demonstrated by the fact that its assertions regarding specific construction techniques that should have been required in the SOC (e.g., excavating the slope by hand or sheathing the pipeline) are not supported by the petitioner's expert's statement, which proposes using a backhoe on the slope and does not reference sheathing as an option.

Moreover, the Order of Conditions, incorporated by reference in the SOC, contains specific provisions to address the possibility of slope failure and erosion by requiring a pre-construction written plan describing how the work will be done with the objective of minimizing exposed soil to prevent erosion and stabilizing the final construction to ensure no erosion or slope failure. The Order further requires the contractor to meet with the Commission Agent on the site to discuss work methods and designate the excavation path to minimize potential erosion and preserve trees. (Condition 29) In addition, the SOC provides for a limit of work to be established at the down slope portion and erosion controls barriers be placed to protect the lake. While the petitioner would prefer to have those requirements spelled out in greater detail in advance of construction, it is not a basis to maintain this appeal.

For the reasons set forth above, I recommend that the Department's motion to dismiss be granted and the appeal dismissed.

NOTICE

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Philip Weinberg
Presiding Officer